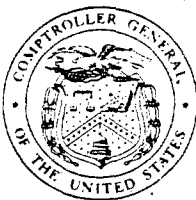


8709

## DECISION

THE COMPTROLLER GENERAL  
OF THE UNITED STATES

WASHINGTON, D.C. 20548

*J. D. Mosler*  
*Pay II*  
[Claim by Beneficiary for Unpaid Retired or Retainer Pay of Military Member]

FILE: B-174048

DATE: December 28, 1978

MATTER OF: Chief Petty Officer Russell F. Thornberry, USN  
(Retired)

- DIGEST:
1. The retired pay of a retired member of the armed services accrues only during his life-time. Payment of such pay is generally authorized to be made only to the retired member, except that upon his death the amount accrued but unpaid may be paid to his beneficiary as provided by 10 U.S.C. 2771 (1976). Therefore, the fact of the member's death and date of death must be established before payment may be made on such claim.
  2. Where the only basis presented for payment of a claim for retired pay of a missing person is a State court decree entered on the basis of presumptive evidence in a proceeding in which the United States is not a party, the United States is not necessarily bound by such a decree. In the absence of further proof that the member was alive after the date of disappearance, the claim of the member's son as beneficiary of unpaid retired pay accrued after the date of disappearance is too doubtful to allow.

This decision is in response to a claim from Roark Russell Thornberry, as designated beneficiary, for unpaid retired or retainer pay due his father, Chief Petty Officer Russell F. Thornberry, USN (Retired) 560 34 5219. The claim was forwarded on his behalf by his attorney, Richard D. Hatch, Esq., and constitutes, in effect, an appeal from a settlement by the Claims Division of this Office dated April 23, 1976, which disallowed Roark R. Thornberry's claim for his father's unpaid retired or retainer pay.

Apparently, Russell F. Thornberry was transferred to the United States Navy Fleet Reserve in 1960 and became entitled to retainer pay. The member disappeared sometime in 1966. The last retainer paycheck issued to him by the Navy was sent in December 1966 and was returned to the Navy as undeliverable. Nothing has been heard from the member since December 1966.

~~002984~~

Dec.

B-174048

On September 11, 1975, the Superior Court of the State of California, in and for the County of Santa Barbara, in an ex parte proceeding instituted by his spouse, Ruby June Thornberry, issued an order stating that Russell Frank Thornberry died on or about June 5, 1975. The petition filed in that matter is not contained in the file but the order was apparently based upon the member's unexplained absence for a period of over 7 years. The United States was not a party to that proceeding nor was it represented at the hearing on the matter.

The retired pay of a retired member of the armed services accrues only during the life of the member. 48 Comp. Gen. 706 (1969). Payment of such pay is generally authorized to be made only to the retired member, except that upon his death the amount accrued but unpaid may be paid to his beneficiary as provided by 10 U.S.C. 2771 (1976). Therefore, the fact of the member's death and the date of death must be established before payment may be made on such claim for unpaid retired pay. We have also held that retired pay may not be paid for any period subsequent to the last day on which the member is known to have been alive, when the actual date of death is not established by competent evidence. 14 Comp. Gen. 411 (1934), and 43 Comp. Gen. 503 (1964).

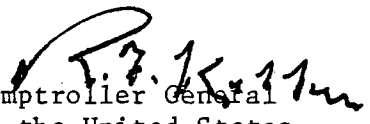
In cases where a judicial decree declares that a person is presumed to be dead on a designated date, such a decree does not establish that the person concerned lived for any fixed period or that his life did not end immediately after his unexplained absence. See Davie v. Briggs, 97 U.S. 628 (1878). Further, even a statutory presumption of death does not purport to create a conclusive presumption that the individual died at the end of the 7-year period, nor does it preclude the introduction of evidence to show that death occurred earlier. Peak v. United States, 553 U.S. 43, 45-46 (1957). See also 43 Comp. Gen. 503, 504, supra, and B-192669, December 1, 1978, 58 Comp. Gen. \_\_\_\_.

In settling similar missing persons' cases we have said that in the absence of an applicable Federal statute, we will give great weight to the determinations of the State courts under State statutes, particularly where the United States has been represented in the State court and the pertinent issues are presented to the court. See B-187165, September 16, 1976. However, where the only basis presented to us for payment of a claim for retired

B-174048

pay of a missing member is a State court decree entered on the basis of presumptive evidence in a proceeding to which the United States is not a party, we have followed the rule that the United States is not necessarily bound by such a decree. See Privett v. United States, 256 U.S. 201 (1921); United States v. Candelaria, 271 U.S. 432 (1926). In the absence of further proof in such cases that the member was alive after the date of disappearance, such claims are too doubtful for us to allow. In such cases the claimants are left to pursue their claims in the Federal courts. See for example B-176008, September 18, 1972; B-173649, August 31, 1971; and B-192669, December 1, 1978, 58 Comp. Gen. \_\_\_\_, supra.

Accordingly, in view of the lack of specific information relating to the continued life of the member, Mr. Roark R. Thornberry's claim is too doubtful for us to allow. Therefore the Claims Division's action disallowing the claim is sustained.

  
Acting Comptroller General  
of the United States



8709

COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

J. D. Mooker  
PLM II

IN REPLY  
REFER TO: B-174048

December 28, 1978

The Honorable John Young  
House of Representatives

Dear Mr. Young:

This is in response to your recent inquiry on behalf of Roark R. Thornberry, the son of Chief Petty Officer Russell F. Thornberry, USN (Retired). Mr. Roark Thornberry has appealed a settlement by our Claims Division dated April 23, 1976, which disallowed his claim for unpaid Navy retired or retainer pay claimed to be due Russell F. Thornberry.

By decision of today, B-174048, copy enclosed, we sustained the settlement of the Claims Division disallowing Mr. Thornberry's claim. This decision is based upon the premise that retired pay accrues only during the lifetime of the retired member and may not be paid for any period subsequent to the last day in which the member is known to have been alive, when the actual date of death is not established by competent evidence. In cases where a judicial decree declares that a person is presumed to be dead on a designated date, such a decree does not establish that the person concerned lived for any fixed period or that his life did not end immediately after his unexplained absence. Where the only basis presented for payment of a claim for retired pay of a missing person is a State court decree entered on the basis of presumptive evidence in a proceeding in which the United States is not a party, the United States is not bound by such a decree. In the absence of further proof in such cases that the member was alive after the date of disappearance, such claims are too doubtful for us to allow and claimants are left to pursue their remedies in the Federal courts.

We trust this serves the purpose of your inquiry and regret that we are unable to provide a more favorable response.

Sincerely yours,

*R. F. Kellum*  
Acting Comptroller General  
of the United States

Enclosure